

1 EDUCATION AND WORKFORCE DEVELOPMENT CABINET

2 Kentucky Board of Education

3 Department of Education

4 (Amended After Comments)

5 701 KAR 8:030. Charter school appeal process:

6 RELATES TO: KRS Chapter 13B, 160.1590, 160.1591, 160.1592, 160.1593, 160.1594,

7 160.1595, 160.1596, 160.1597, 160.1598, 160.1599

8 STATUTORY AUTHORITY: KRS 13B.170, 160.1598

9 NECESSITY, FUNCTION, AND CONFORMITY: KRS 160.1598 requires the Kentucky Board

10 of Education to promulgate an administrative regulation to establish the process to appeal a

11 decision of an authorizer denying a charter application or a charter contract amendment request,

12 unilaterally imposing conditions on the applicant or charter school, or revoking or nonrenewing a

13 charter contract. This administrative regulation provides the requirements for the appeal process.

14 Section 1. Definitions. (1) "Appellant" means the applicant or charter school board of directors

15 filing the appeal of an authorizer's decision denying a charter application or a charter contract

16 amendment request, unilaterally imposing conditions on the applicant or charter school, or

17 revoking or nonrenewing a charter contract.

18 (2) "Applicant" is defined in KRS 160.1590(3).

19 (3) "Authorizer" or "public charter school authorizer" is defined in KRS 160.1590(13).

20 (4) "Charter" means charter contract.

21 (5) "Charter application" is defined in KRS 160.1590(4).

- 1 (6) "Charter contract" or "contract" is defined in KRS 160.1590(5).
- 2 (7) "Charter school" means a public charter school.
- 3 (8) "Charter school board of directors" is defined in KRS 160.1590(6).
- 4 (9) "Days" means calendar days calculated pursuant to KRS 446.030.
- 5 (10) "Knowingly" means that a person knew that in authorizing, ordering, or carrying out an act
6 or omission that the act or omission constituted a violation of a statute or administrative
7 regulation.
- 8 (11) "Local school district" is defined in KRS 160.1590(10).
- 9 (12) "Notice" means written notice.
- 10 (13) "Notify" means provide written notice.
- 11 (14) "Public charter school" is defined in KRS 160.1590(12).
- 12 (15) "Unilateral imposition of conditions" means the authorizer has placed or attempted to
13 place conditions or requirements that are not required by KRS 160.1590 to 160.1599, 161.141,
14 or 701 KAR Chapter 8:
- 15 (a) On the applicant in the authorizer's formal action approving the charter application; or
- 16 (b) On the charter school in the charter contract or an amendment.
- 17 (16) "Unilaterally imposed conditions" or "Unilateral conditions" or "Conditions unilaterally
18 imposed" means conditions or requirements not required by KRS 160.1590 to 160.1599,
19 161.141, or 701 KAR Chapter 8 that the authorizer places or attempts to place:
- 20 (a) On the applicant in the authorizer's formal action approving the charter application; or
- 21 (b) On the charter school in the charter contract or an amendment.
- 22 Section 2. Policies and Procedures. (1) The authorizer shall create and publish on its website
23 policies and procedures for its implementation of KRS 160.1595 and 160.1598 as follows:

- 1 (a) The authorizer shall include in its policies and procedures a rubric for its evaluation of a
2 charter application and its rubric for evaluation of charter contract performance for renewal;
- 3 (b) The authorizer shall publish on its website its policies and procedures, including any rubric
4 for evaluation of charter contract performance for renewal under KRS 160.1598;
- 5 (c) The authorizer shall include in its policies and procedures the circumstances that shall result
6 in automatic revocation or nonrenewal of a charter contract, only as allowed in KRS 160.1590 to
7 160.1599, 161.141, and 701 KAR Chapter 8;
- 8 (d) The authorizer shall include in its policies and procedures the requirements and timeline for
9 timely notification of the prospect of revocation or nonrenewal of the charter contract and of the
10 reasons for such possible closure;
- 11 (e) The authorizer shall include in its policies and procedures the reasonable deadline and
12 requirements for a charter school's opportunity to respond to the authorizer's notice of the
13 prospect of revocation or nonrenewal of the charter contract; and
- 14 (f) The authorizer shall include in its policies and procedures the requirements for appeal of an
15 authorizer decision denying a charter application or a charter amendment request, nonrenewing
16 or revoking a charter contract, or imposing unilateral conditions on an applicant or charter
17 school.

18 Section 3. Appeal. (1) The appellant shall submit its appeal of an authorizer's decision denying a
19 charter application or a charter amendment request, nonrenewing or revoking a charter contract,
20 or imposing unilateral conditions on an applicant or charter school to the commissioner of
21 education, to receive the appeal on behalf of the Kentucky Board of Education, as follows:

- 22 (a) The deadline for appeals to the Kentucky Board of Education under KRS 160.1595 shall be
23 thirty (30) days, as evidenced by the face of the authorizer's notice to the charter school or

applicant of the decision to deny a charter application or charter contract amendment request, to impose unilateral conditions on the applicant or the charter school, or to revoke or nonrenew the charter contract;

(b) The appeal shall include the name, phone number, mailing address, and email address of the contact for the appellant and any legal counsel;

(c) The appeal shall include a statement from the appellant whether there is a request for a hearing, and whether the hearing is requested to be held in the local school district in which the charter school lies or would lie; and

(d) The appeal shall be submitted on the Notice of Appeal and include any necessary additional documentation.

(2) The Kentucky Board of Education **shall affirm the decision of the authorizer based on the appellant's failure to timely file the appeal, pursuant to KRS 160.1595(2) and subsection 1(a) of this section, and** may affirm the decision of the authorizer based on the failure of an appellant to meet any of the **other** deadlines of this administrative regulation or the hearing process.

(3) Within five (5) days of the commissioner's receipt of the appeal, the commissioner of education on behalf of the Kentucky Board of Education shall provide notice to the appellant and the authorizer acknowledging receipt of the appeal, and:

(a) If a hearing is requested in the appeal, the commissioner of education shall designate a hearing officer to set the prehearing schedule, to conduct a KRS Chapter 13B public hearing before the Kentucky Board of Education on the appeal, and to set the location of the public hearing; or

(b) If a hearing is not requested in the appeal or if the appellant waives its right at any time to a

1 hearing by providing written notice of its waiver to the commissioner of education or to any
2 previously appointed hearing officer, the hearing officer shall set the schedule for written
3 pleadings under KRS 13B.090(2) to be submitted to the Kentucky Board of Education without a
4 hearing.

5 (4) The written decision of the Kentucky Board of Education shall be issued no later than seven
6 (7) days after the conclusion of the hearing or the meeting to decide upon the written pleadings,
7 which shall be held within the time allowed in KRS 160.1595(3)(a).

8 Section 4. Emergency action. (1) Emergency action taken by the authorizer pursuant to KRS
9 160.1598(7) shall be taken in accordance with KRS 13B.125.

10 Section 5. Automatic Revocation or Nonrenewal. (1) The Kentucky Board of Education shall
11 affirm revocation or nonrenewal of a charter school for whom the commissioner of education has
12 determined a member of the charter school board of directors, or an education service provider at
13 the direction of a member of the board of directors, or an employee at the direction of a member
14 of the board of directors, has knowingly violated 703 KAR 5:080, Administration Code for
15 Kentucky's Assessment Program, or KRS 160.1592(3)(g) for a student assessment included in
16 the performance framework of the charter contract or the state accountability system after:

17 (a) The department's presentation of a preponderance of evidence at a KRS Chapter 13B hearing
18 before the Kentucky Board of Education that a member of the charter school board of directors,
19 or an education service provider at the direction of a member of the charter school board of
20 directors, or an employee at the direction of a member of the charter school board of directors,
21 has knowingly violated 703 KAR 5:080, Administration Code for Kentucky's Assessment
22 Program, or KRS 160.1592(3)(g) for a student assessment included in:

23 1. The performance framework of the charter contract; or

1 2. The state accountability system; or

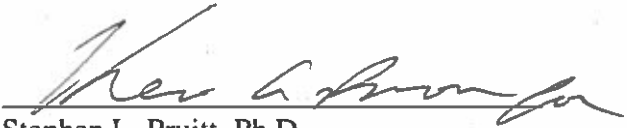
2 (b) The charter school board of directors waives its right to a KRS Chapter 13B hearing under
3 this section.

4 Section 6. Incorporation by Reference. (1) "Notice of Appeal", February 2018, is incorporated
5 by reference.

6 (2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at
7 the Department of Education, Office of Legal, Legislative and Communication Services, 5th
8 floor, 300 Building, 300 Sower Boulevard, Frankfort, Kentucky, Monday through Friday, 8 a.m.
9 to 4:30 p.m.

This is to certify that the chief state school officer has reviewed and recommended this administrative regulation prior to its adoption by the Kentucky Board of Education, as required by KRS 156.070(5).

12-13-17
(Date)


Stephen L. Pruitt, Ph.D.
Commissioner of Education

12/14/17
(Date)


Mary Gwen Wheeler, Chair
Kentucky Board of Education

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Administrative Regulation: 701 KAR 8:030

Agency Contact Person: Kevin C. Brown

Phone: 502-564-4474

Email: kevin.brown@education.ky.gov

(1) Provide a brief summary of:

(a) What this administrative regulation does: This new administrative regulation fulfills the regulation promulgation requirement of the agency in KRS 160.1598.

(b) The necessity of this administrative regulation: KRS 160.1598 became effective on June 29, 2017. This administrative regulation provides guidance on the process for a public charter school appeal of an authorizer's decision to revoke or non-renew a charter school.

(c) How this administrative regulation conforms to the content of the authorizing statutes: KRS 160.1598 requires the Kentucky Board of Education (KBE) to promulgate administrative regulations providing guidance on the process for a public charter school appeal of an authorizer's decision to revoke or non-renew a charter school. This administrative regulation provides guidance from the agency on the process for a public charter school appeal of an authorizer's decision to revoke or non-renew a charter school.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: KRS 160.1598 requires the Kentucky Board of Education (KBE) to promulgate administrative regulations provides guidance from the agency on student application, lottery, and enrollment in the public charter schools. This new administrative regulation provides guidance to facilitate transparency and uniformity in the process for a public charter school appeal of an authorizer's decision to revoke or non-renew a charter school, as required by KRS 160.1598.

(2) If this is an amendment to an existing administrative regulation, provide a brief summary of:

(a) How the amendment will change this existing administrative regulation: N/A.

(b) The necessity of the amendment to this administrative regulation: The authorizing statute requires the agency to provide guidance on the process for a public charter school appeal of an authorizer's decision to revoke or non-renew a charter school.

(c) How the amendment conforms to the content of the authorizing statutes: N/A.

(d) How the amendment will assist in the effective administration of the statutes:

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: Charter school authorizers, public charter schools, students attending public charter schools, and the Kentucky Department of Education will be affected by this administrative regulation.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: Public charter schools, for whom the authorizer has decided to revoke or non-renew the charter contract, will have to appeal the authorizer's decision pursuant to this administrative regulation to prevent revocation or nonrenewal. Charter authorizers, that revoke or non-renew a charter school's contract, will have to allow the charter school the due process opportunity to challenge the revocation or nonrenewal decision. The Kentucky Department of Education shall provide support to ensure the transparent and uniform appeal process for public charter schools.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): Compliance costs for authorizers and charter schools should be minimal to none because the statutes require the substance of what the authorizer and the charter school will present in an appeal. Same for the Kentucky Department of Education.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): This new administrative regulation will provide guidance on the process for a public charter school appeal of an authorizer's decision to revoke or non-renew a charter school.

(5) Provide an estimate of how much it will cost to implement this administrative regulation:

(a) Initially: Compliance costs should be minimal to none.

(b) On a continuing basis: Compliance costs should be minimal to none.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Kentucky Department of Education general funds and school district funds, and funds provided to public charter schools.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new, or by the change, if it is an amendment: No fees or additional funding is necessary.

(8) State whether or not this administrative regulation established any fees or directly or indirectly increased any fees: N/A.

(9) TIERING: Is tiering applied? Tiering was not appropriate in this administrative regulation because the administrative regulation applies equally to all school districts and all public charter schools.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

Administrative Regulation: 701 KAR 8:030

Contact Person: Kevin C. Brown

Phone: 502-564-4474

Email: kevin.brown@education.ky.gov

1. What units, parts or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation?: Charter school authorizers, public charter schools, and the Kentucky Department of Education.
2. Identify each state or federal statute or federal regulation that requires or authorizes the action taken by the administrative regulation. KRS 160.1598.
3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect. This administrative regulation should have no impact on the expenditures or revenues for public charter schools, their authorizers, or the agency.
 - (a) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? This administrative regulation should not impact school district or public charter school revenues.
 - (b) How much revenue will this administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? This administrative regulation should not impact school district or public charter school revenues.
 - (c) How much will it cost to administer this program for the first year? Administration costs to school districts or public charter schools should be minimal to none.
 - (d) How much will it cost to administer this program for subsequent years? Administration costs to school districts or public charter schools should be minimal to none.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-):

Expenditures (+/-):

Other Explanation:

There should be no fiscal impact resulting from the new administrative regulation.

STATEMENT OF CONSIDERATION
RELATING TO 701 KAR 8:030
Kentucky Department of Education

Amended After Comments

1. A public hearing was held on the above regulation on November 21, 2017 at 10:00 a.m. Eastern Time, in Room 116, 300 Sower Boulevard, 5th Floor, Frankfort, Kentucky. Written comments were also received during the public comment period.

2. The following individuals attended this public hearing or submitted written or verbal comments:

Disclaimer: All titles and affiliations were provided by the commenters through public written comments or testimony at the public hearing. The titles and affiliations of each person have not been evaluated by the agency, and the listing of specific titles and affiliations in the Statement of Consideration does not confer status or actual authority upon an individual not otherwise qualified by other authoritative source.

<u>Name and Title</u>	<u>Agency/Organization/Entity/Other</u>
Mary Ruble, Executive Director	Kentucky Education Association
Lynn Schaber	Potential regional achievement zone charter school applicant
Kerri Schelling, Executive Director	Kentucky School Boards Association
David Wickersham, Director	Office of Education Accountability

3. The following people from the promulgating administrative body responded to the written comments:

<u>Name and Title</u>
Kevin C. Brown, General Counsel/Associate Commissioner, Office of Legal, Legislative, and Communication Services (OLLCS)
Amy Peabody, Deputy General Counsel, OLLCS
Earl Simms, Director, Division of Charter Schools

Summary of Comments and Responses

1. Subject Matter: Authority for the administrative regulation's appeal procedures

(a) Comment: OEA commented that it questioned the authority of the agency to include the six (6) authorizer decisions in KRS 160.1598 in the agency's administrative regulation governing the procedure of an appeal of these decisions.

(b) Response: The agency thanks OEA for its comments on this administrative regulation.

KRS 13B.170 provides:

- (1) An agency shall have authority to promulgate administrative regulations that are necessary to carry out the provisions of this chapter.
- (2) Nothing in this chapter shall be construed to prohibit an agency from enacting administrative hearing procedures by administrative regulations which are supplemental to the provisions of this chapter.

The agency has general authority to rule on these appeals per KRS 160.1595 and the general authority of the agency to regulate public schools in KRS 156.160. KRS 160.1598(8) provides the language granting regulatory authority to the agency over these appeals of these authorizer decisions. Those statutory cites together combine to give the agency the authority to promulgate an administrative regulation that covers the procedure for all the six (6) authorizer actions that can be appealed to the agency. For these reasons, a change to this administrative regulation's statutory authority citations has been made in response to this comment.

2. Subject Matter: Unilaterally imposed conditions

(a) Comment: KSBA commented that:

“‘Unilateral imposition of conditions,’ as defined in 701 KAR 8:020, Section 1(48) and 701 KAR 8:030, Section 1(15), and ‘unilaterally imposed conditions,’ as defined in 701 KAR 8:020, Section 1(49) and 701 KAR 8:030, Section 1(16), impermissibly modify or vitiate statutory intent in violation of KRS 13A.120(2)(i). Specifically, these definitions are overly broad and cover conditions and requirements not explicitly required by the charter school enabling statutes, which expands the review authority of the KBE beyond the scope intended by the legislature as indicated in KRS 160.1595. Instead, the key statutory language grants an authorizer greater flexibility regarding the charter contract that these regulatory definitions purport to take away. Specifically, KRS 160.1596(1)(c)(11) is enabling language allowing a charter contract negotiated between the authorizer and the board of directors to include “[a]ny other terms...agreed to by the authorizer and the board of directors, including pre-opening conditions.” While the statute places certain limits on this expressly authorized flexibility, it does not purport to say that anything not expressly required by the charter statutes is deemed to constitute the “unilateral imposition of conditions.” Rather, the subsection specifically provides that *reasonable* conditions shall not include: (1) enrollment caps; (2) operational requirements that place undue constraints on a public charter school; or, (3) those that “are contradictory” to the charter school enabling statutes. Mutually agreed upon conditions that are not specifically barred by the enabling statutes should be deemed *reasonable* and should not constitute “unilaterally imposed conditions” subject to appeal under the regulations.

It should be noted that, with regard to boards of education, the express statutory authorization for “any other terms agreed to” is not tethered to the express requirements in the charter statutes or corresponding regulations. The school board’s authority to contract is granted in KRS 160.160 in furtherance of the board’s management and control of its school district. The definitions in 701 KAR 8:020, Section 1(48) and (49) and in 701 KAR 8:030, Section 1(15) and

(16) unduly restrict an authorizer's flexibility to innovate and/or address local needs as intended by the legislature."

(b) Response: The agency appreciates this comment and believes that the definitions provided for "unilaterally imposed conditions" and "unilateral imposition of conditions" in this administrative regulation and in 701 KAR 8:030 are within the statutory intent expressed by the General Assembly in KRS 160.1590-160.1599 and 161.141 but believes there is room for additional clarification in the definition to provide for those circumstances when an authorizer may be requesting a change in the charter contract, by requesting amendment of the charter contract, and the charter school has not yet agreed to amend the charter contract in response to that unilateral authorizer request. A version of these phrases is included in the Kentucky legislation at KRS 160.1595(1) and (2) and (3) as an authorizer action that can be appealed to the agency; and in KRS 160.1596(1)(c)11. The latter appearance in the legislation is as follows:

The executed charter contract shall become the final authorization for the public charter school. The charter contract shall include: ... 11. Any other terms and conditions agreed to by the authorizer and the board of directors, including pre-opening conditions. Reasonable conditions shall not include enrollment caps or operational requirements that place undue constraints on a public charter school or are contradictory to the provisions of Sections 1 to 10 and 11 of this Act. Such conditions, even when incorporated in a charter contract, shall be considered unilaterally imposed conditions.

The language above demonstrates the statutory framework of including "any other terms and conditions agreed to by the authorizer and the [charter school] board of directors" as "unilaterally imposed conditions." As well, an authorizer has the authority, pursuant to KRS 160.1594(3)(e) and (f), to request additional information and provide information to an applicant as to identified deficiencies to remedy in the charter application in reviewing and considering approval or denial of a charter application. These would be unilaterally imposed conditions for approval of the charter application, initiated by the authorizer. As a result, the agency does not understand the definitions and provisions of 701 KAR 8:020 and 701 KAR 8:030 for these terms to impermissibly modify or vitiate statutory intent in violation of KRS 13A.120(2)(i) and is amending the definition in the administrative regulation in response to this comment to more fully provide for the types of circumstances that the agency understands may fall within the term.

3. Subject Matter: Statutory appeal deadline

(a) Comment: KSBA commented that it understood the provisions of Section 3(2) of this administrative regulation to "give the KBE the option to affirm an authorizer's decision when an appeal is not timely filed."

(b) Response: The agency appreciates the comment and desires to avoid any appearance of vitiation of the deadline for an appeal in KRS 160.1595(2) by the language of this administrative regulation. For this reason, a change has been made to the administrative regulation in response to this comment.

4. Subject Matter: Regional achievement zone charter schools and different authorizers

(a) Comment: Ms. Schaber commented that she was concerned that the administrative

regulations did not adequately provide for the regional achievement zone applicants and schools and authorizers other than a single local board of education.

(b) Response: The agency has reviewed the administrative regulation in light of this comment and did not find any provisions of this administrative regulation that required amendment to ensure full contemplation and inclusion of charter school applicant or charter school appellants that were from a regional achievement zone or that had as the authorizer an authorizer other than a single local board of education. As a result, the agency is not making a change to this administrative regulation in response to this comment.

5. Subject Matter: Agency authority to order authorization of a charter school

(a) Comment: Kentucky Education Association commented that they disagreed with the administrative regulation's provisions allowing the agency to make the final decisions regarding authorization of charter schools, even "over the stated objections of the 'authorizer.' The administrative obligations and resulting costs of operating a charter school should not be involuntarily imposed on any public school district or upon any other unwilling authorizer."

(b) Response: While this agency understands the concern for the ability of the agency to order an authorizer, on a second appeal under the statutes, to approve a charter school application, this is the result of the statutory authority, not the administrative regulation. It is important to note that the statutory basis for decision on appeal to the agency of authorizer decisions is whether "the authorizer's decision was contrary to the best interest of the students or community". KRS 160.1595(3)(a). The agency believes this is integral to the appeal process and the agency's decisions on appeal. As well, pursuant to the statutes, this agency decision is subject to judicial review. For this reason, the agency has not made a change to the administrative regulation in response to this comment.

Summary of Statement of Consideration Action Taken by Promulgating Administrative Body

The Kentucky Department of Education received and has responded to five (5) different categories of comments from the public regarding new administrative regulation 701 KAR 8:030. Commenter requested amendment of the definition of "unilateral imposition of conditions" and "unilaterally imposed conditions". Commenter requested clarification of the agency's authority for including all six (6) authorizer actions, subject to appeal, in this administrative action on the process for those appeals under KRS Chapter 13B. Commenter requested the addition of language to clarify that the statutory deadline for filing an appeal can not and is not being waived by the agency in the administrative regulation. Commenter requested review and any amendment necessary to ensure the administrative regulation covered regional achievement zone charter schools and different types of authorizers. Commenter expressed disagreement with the agency's ability under the statutes to order an authorizer to authorize a charter school during the second appeal to the agency.

The agency amended the definition of "unilateral imposition of conditions" and "unilaterally imposed conditions". The agency added language to clarify that the statutory deadline for filing an appeal can not and is not being waived by the agency in the administrative regulation. The

agency added a citation for its statutory authority for the contents of this administrative regulation. The agency reviewed and did not find the need to make any amendment necessary to ensure the administrative regulation covered regional achievement zone charter schools and different types of authorizers. The agency was unable to make any change to the administrative regulation diminishing the agency's statutory authority to order an authorizer to approve a charter school application on the second appeal to the agency.

The agency proposes the following amendments after comments to the administrative regulation:

Page 1

Section STATUTORY AUTHORITY

Line 8

After "KRS, insert "13B.170,".

Page 2

Section 1(15)

Line 12

After "has placed", insert "or attempted to place".

Page 2

Section 1(16)

Line 19

After "places", insert "or attempts to place".

Page 4

Section 3(2)

Line 11

After "Education", insert "shall affirm the decision of the authorizer based on the appellant's failure to timely file the appeal, pursuant to KRS 160.1595(2) and subsection 1(a) of this section, and".

Page 4

Section 3(2)

Line 12

After "any of the", insert "other".